FILE COPY

FEB

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 379

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,

Appellants,

vs.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

REPLY BRIEF FOR RAILROAD APPELLANTS.

WALTER MCFARLAND,
H. H. LARIMORE,
FRANK H. TOWNER,
ELMER A. SMITH,
JOHN T. QUISENBERRY,
Attorneys for Railroad Appellants.

Chicago, Ill.,
Feb. 1, 1935.

INDEX.

PAGE

STATEMENT 1

ARGUMENT 5

The Commission Did Not Arbitrarily Disregard the Rates and Distances to the Destinations Other Than to Rockford and Freeport Which Were Intermediate to Those Points and the Indiana Origin Groups 5

The Commission Has Not Arbitrarily Disregarded Evidence Consisting of Comparisons of Rates on a Strict Mileage Basis. The Rate Adjustment Involved Is a Differentially Related Group Rate Adjustment in Which Mileage Has Not Been Controlling and the Lawfulness of the Milwaukee's Proposed Rates Which Were a Part of This Adjustment Could Not Be Determined by Mileage in the Manner Attempted by the Milwaukee and the Indiana Operators 8

The Commission's Decision in the Instant Case Was Not Inconsistent with Its Prior Decisions in the Western Kentucky Cases, Nor Do the Findings in Those Cases Prohibit Further Reductions in the Western Kentucky Rates to Meet Reductions in the Rates from Southern Illinois Which Would Be Precipitated by the Milwaukee's Reductions from the Indiana Field..... 18

CONCLUSION 25

tent to which they take issue with the appellants in regard to matters of law. They apparently concede the general power of the Commission to prevent reductions in rates which would precipitate general rate reductions and bring about an unwarranted dissipation of the carriers' revenue. They contend, however, that the instant case does not present an occasion for the exercise of that power in the manner in which the Commission did exercise it, and in their efforts to cut down the power to fit their conception of the case so restrict its exercise that as a practical matter they destroy it. For example, it is apparently the position of the Milwaukee (page 38 of its brief) that before a reduced rate can be found unlawful it must be found noncompensatory and, further (page 40 of its brief), that the rate structure which the reduced rates would disrupt must be found lawful in every respect. Such restrictions would paralyze the administrative arm of the Commission. The non-compensatory requirement was disposed of in *Jefferson Island Salt Mining Co.* v. *United States*, 6 F. (2d) 315, discussed in our original brief. The particular rate adjustment here involved had been prescribed or approved by the Commission to an unusual degree. The Commission had held that the general level of the rates was low. It had recently held in the thirteenth section case that the relationships between the rates from the Indiana groups and the rates from the Illinois groups to Rockford and Freeport which the Milwaukee's reductions would disrupt were not unlawful. It found that the relationships of the Illinois groups to each other were in general accord with those prescribed by it in an earlier proceeding and that the relationships of the Indiana groups to each other, though not prescribed by it, were of long standing. The Commission it is true, had not prescribed or approved every individual rate and relationship in the adjustment, but it is obvious that the Commission is not required to

find every other rate in a particular adjustment lawful before it can find an individual rate is unlawful. The issue in the instant case was the lawfulness of the rates proposed by the Milwaukee and whether the disruption of the general rate structure in the manner Milwaukee proposed was warranted under the circumstances. This issue the Commission decided correctly and it is of no consequence what it might have held with respect to other rates.

The Milwaukee further contends that the Commission cannot prevent a proposed reduction in rates without prescribing a specific minimum rate to be observed thereafter. This proposition has been discussed at some length in the brief for the United States and the Commission (pages 39-43). In addition to the cases there cited, we call attention to the Commission's discussions of its powers of suspension in *Salt From Louisiana Mines To Chicago,* 69 I. C. C. 312, 313 and *Lignite Coal From North Dakota,* 126 I. C. C. 243, 244, in which the practical effect of the Milwaukee's contention is clearly indicated.

The purpose of this reply brief on behalf of the appellant railroads, however, is not to deal with the discussions of the points of law in the briefs for the appellees, as such, but instead to analyze and answer three specific contentions made by the appellees with regard to the state of the evidence and the Commission's treatment of the evidence in arriving at the conclusions embodied in its findings and order. These contentions concern the evidence with regard to rates to points other than Rockford and Freeport, comparisons of rates and distances and the alleged inconsistency of the Commission's findings and order in the instant case with its prior decisions dealing with the western Kentucky rates. Considerable portions of the appellees' briefs are given over to discussion of these matters. Although the appellees' arguments on these points are generally couched in terms of "the arbitrary disre-

garding of evidence" and "lack of evidence," when analyzed they become a plea to this Court to re-examine the evidence before the Commission, weigh it and substitute the Court's judgment for that of the Commission. The portions of the appellees' briefs dealing with the evidence, and particularly such portions of the brief of the Indiana operators, the Binkley Mining Company, *et al.*, consist in a large measure of detailed comparisons of rates and distances in an effort to show that a different conclusion should be drawn from the evidence than that which was drawn from it by the Commission. These arguments might have constituted proper arguments before the Commission but we do not believe that they deal with matters with which this Court is primarily concerned and that the Court will see at the outset that the appellees' plea is in fact a plea that this Court weigh the evidence and substitute its judgment for that of the Commission.

The detailed nature of the appellees' treatment of the evidence on the particular points under consideration has necessitated a detailed and perhaps tedious reply. We have not undertaken to controvert specifically every statement made in the appellees' briefs regarding the evidence but have endeavored to deal with the evidence in a general way in so far as the situation permitted. We believe that if the Court considers it necessary to examine the evidence in somewhat greater detail on these points than it was treated in our original brief, it will conclude from the analysis of the evidence in this reply, not only that appellees' contentions amount to a plea to weigh the evidence, but also that they are in fact without support in the evidence itself. The argument with respect to the three points to be treated has been summarized in topical headings.

ARGUMENT.

THE COMMISSION DID NOT ARBITRARILY DISREGARD THE RATES AND DISTANCES TO THE DESTINATIONS OTHER THAN ROCKFORD AND FREEPORT WHICH WERE INTERMEDIATE TO THOSE POINTS AND THE INDIANA ORIGIN GROUPS.

It is contended at length in the brief for the Indiana operators, The Binkley Mining Company, *et al.*, that the Commission arbitrarily disregarded the evidence relating to the rates and distances to the destinations intermediate to the origin groups and Rockford and Freeport. They set out in tables on pages 4 and 5 of their brief, in the section devoted to the statement of the case, the rates and distances from the various origin groups to Rockford and Freeport and to eight of the intermediate destinations as shown by them in their Exhibits 8 and 9. A footnote to the tables states that all of the distances other than those to Rockford and Freeport were shown only in the exhibits of these interveners and are not controverted. This is incorrect as to DeKalb. Distances to DeKalb were shown in Exhibit 29 of the Southern Illinois operators' (R. 195), recapitulated in their Exhibit 30 (R. 201). The distances there shown conflict with the distances shown by the Indiana operators in the tables in their brief. For example, the distance from Southern Illinois to DeKalb shown in Exhibit 30 is 336 miles, compared with a distance of 359 miles shown by the Indiana operators. There are likewise discrepancies with respect to other distances to DeKalb.

The Indiana operators state on page 15 of their brief that the Commission's consideration dealt only with the destinations of Rockford and Freeport and call attention to numerous rates and distances to intermediate points in succeeding pages. The Commission's reports show clearly

that the Commission did not disregard the intermediate points. The rates to DeKalb and to other representative intermediate points selected by the Indiana operators are referred to in the report of Division 2 (R. 11), and the statement made:

> "We are of the opinion that the distances from the Brazil-Clinton group to Rockford and Freeport, rather than to all of the stations in the footnote, afford the proper basis for comparison."

In other words, the Commission rejected the averages of the distances to the intermediate destinations, several of which had been set out by it in its report preceding the statement quoted. Rates and distances to the representative intermediate points are likewise set out in the report of the full Commission (R. 43). Comparisons of the average distances were made.

It is true that the Commission did not give the weight to the evidence with respect to the rates and distances to the intermediate points that the Indiana operators contend should have been given to it, but in so doing the Commission was acting entirely within its province. Furthermore, its action with respect thereto was entirely in accord with the record. The importance which the Milwaukee itself, the respondent before the Commission, attached to the intermediate points is clearly indicated by the manner in which it published its rates. Its witness testified that the reductions of 17 cents per ton in the rates to Rockford and Freeport were for the purpose of restoring the relationships which existed prior to August 20, 1930, the date on which the reductions in the rates to Rockford and Freeport required by the Illinois Commission went into effect (R. 74). The Rockford and Freeport rates were simply blanketed back (observed as maxima at intermediate points) as far as Bensenville, on one of the Milwaukee's routes from Indiana, and Duffin, on the other (R. 80). This was ob-

viously to meet the requirements of the long and short haul clause of the fourth section of the Act, and not on account of any concern for the rates and relationships at the intermediate points.

The importance the Milwaukee attached to the rates to the intermediate points is likewise indicated by its testimony before the Commission. Not a single rate or distance to any intermediate point is shown in its Exhibits 1 to 6, inclusive (R. 143-149). Exhibit 2 (R. 144), dealing at length with the history of the rates and relationships, covers Rockford and Freeport only. The witness for the Indiana operators referred only to Rockford and Freeport in designating the important destinations involved in the case (R. 90). The fact is, as the record as a whole demonstrates, the Milwaukee based its case before the Commission on Rockford and Freeport and the case was fought out before the Commission on that basis. The Commission correctly decided the case in the light of the record before it and committed no error in refusing to give to the evidence dealing with the rates and distances to the intermediate points the controlling weight which the Indiana operators insist it should have. As we have previously stated, the Commission's reports show this evidence was not arbitrarily ignored. The Commission, instead, weighed this evidence in the light of the record and decided the case accordingly.

On page 2 of their brief, the Indiana operators question the accuracy of the definition of "group rate" in the footnote on page 3 of the brief for the United States and the Commission on the ground that to some of the intermediate points the rates via some of the more circuitous routes from the Brazil-Clinton and Linton-Sullivan groups are higher than the rates from the Milwaukee mines in those groups. Such higher rates and the routes are set out in the tables on pages 4 and 5 of the Indiana operators' brief.

This does not show at all that the government's definition was inaccurate. These particular rates constituted exceptions to the group rate adjustment, of which the Commission was perfectly aware. The situation was referred to in the report of Division 2 (R. 11), and in the report of the full Commission (R. 44). The mere fact that in certain minor instances the rates from other mines in the Brazil-Clinton and Linton-Sullivan groups to intermediate points were higher than the rates maintained by the Milwaukee from its mines does not by any means constitute a reason for permitting the reductions in rates proposed by the Milwaukee.

THE COMMISSION HAS NOT ARBITRARILY DISREGARDED EVIDENCE CONSISTING OF COMPARISONS OF RATES ON A STRICT MILEAGE BASIS. THE RATE ADJUSTMENT INVOLVED IS A DIFFERENTIALLY RELATED GROUP RATE ADJUSTMENT IN WHICH MILEAGE HAS NOT BEEN CONTROLLING AND THE LAWFULNESS OF THE MILWAUKEE'S PROPOSED RATES WHICH WERE A PART OF THIS ADJUSTMENT COULD NOT BE DETERMINED BY MILEAGE IN THE MANNER ATTEMPTED BY THE MILWAUKEE AND THE INDIANA OPERATORS.

A considerable portion of the testimony of the witnesses before the Commission was given over to the methods of arriving at proper distances in a group rate adjustment and to comparisons of rates and distances. Much of this testimony was conflicting. The conflicts were especially sharp with respect to the weight which should be given various rate comparisons on a mileage basis. The Commission selected out of this conflicting testimony average distances from the principal origin groups to the principal destinations and set them out in its reports (R. 11, 39). The appellant railroads discussed the element of distance in their original brief, beginning on page 72, in which they endeavored to bring out that the Commission acted well

within its province in its treatment of the element of distance in this differentially related group rate adjustment and that its action was by no means arbitrary or unlawful. The greater part of the brief for the Indiana operators, the Binkley Mining Company, *et al.*, beginning on page 14, is devoted to a detailed comparison of rates on a strict distance basis. Similar comparisons are referred to in the brief for the Milwaukee on pages 26 and 27. The treatment of the element of distance in the briefs for the Indiana operators and the Milwaukee would seem to call for a somewhat more detailed discussion of the subject than was made in the original brief for the appellant railroads.

Three different methods of arriving at the distances to be used in connection with the various group rates were employed by the witnesses before the Commission. The method employed by most of the witnesses and adopted by the Commission (R. 10, 39), was the averaging of the distances via the short tariff routes from all origins on all lines in each particular group. This means that the distance via the shortest route over which the group rate is published to apply from each billing point on each line in the group is ascertained, these distances totaled, and the total divided by the number of the billing points used. Where, as is usually the case, the group rate from a billing point applies under the tariffs over several routes, the distance via the shortest tariff route only is used and the more circuitous distances are thus disregarded. Where a billing point is located on two or more different lines it is considered as an origin point on each of the lines and the short tariff distance in connection with each of the origin lines is included. The billing point is likewise counted as a separate billing point on each of the origin lines on which it is located in arriving at the total number of billing points in the group. This is what is meant by the term "all points on all lines" used throughout the testimony.

The second method of arriving at average distances is similar to the first, with the exception that where a billing point is located on more than one origin line, only the distance via the shortest tariff route in connection with any origin line is taken into account, the distances via tariff routes including the other origin lines being disregarded, and the billing point is counted but once in arriving at the total number of billing points in the group. The witness Rozene, representing the Southern Illinois operators, showed average distances arrived at in both of the methods just described, *i. e.* "all points on all lines," and "each billing point used but once," in his series of exhibits, Exhibits 27 to 30, inclusive (R. 183-201). Exhibit 27 is shown on page 183 of the printed record as having been filed by the witness Waffle. This is in error. The exhibit was actually filed by the witness Rozene (R. 114). The two methods of arriving at average distances via short tariff routes were explained by the witness in detail and distinguished in his testimony. (R. 114, 115, 118, 120). Generally speaking, the differences between the distances arrived at using each billing point but once and using all billing points on all lines are not great, as the series of exhibits referred to shows.

A third method of determining distances was employed in the Indiana Operators' Exhibit 19 (R. 95, 169). The method is described as "distances via short rate making line routes" and consists of selecting in each group the origin line which has the shortest route to the destination involved, whether via its single line or in connection with some other carrier, and averaging the distances via this short tariff route from the points on such origin line only, disregarding all other origins on all other lines in the group and the distances therefrom. These distances were apparently shown by the witness for the Indiana operators because distances similarly arrived at had been referred

to in the thirteenth section case. The witness stated (R. 96) that the Indiana operators did not believe that short rate making line distances should be used in determining the relative levels of rates or the relationships of rates. That, however, would be the result of using distances from points on the Milwaukee only in arriving at distances from the Brazil-Clinton and Linton-Sullivan groups. In other exhibits where average distances from groups were shown, the witness of the Indiana operators used the average of the short tariff route distances from all points on all lines in the particular group (R. 95). He endorsed the "average of the short tariff routes from all points on all lines" method of arriving at group distances which was adopted by the Commission in its report (R. 104).

The comparisons of group rates and group distances set out by the Commission in its report (R. 11, 39), speak for themselves. It was not comparisons such as these, however, upon which the Milwaukee and the Indiana operators principally relied before the Commission. Their position was that inasmuch as the Milwaukee had chosen to disrupt the Brazil-Clinton and Linton-Sullivan origin groups and establish the proposed lower rates which applied only from mines on its lines in those groups, only those particular points in the origin groups and the distances via the route of the Milwaukee could be taken into consideration in arriving at average distances to the destinations involved, and that it was proper to compare such average distances with either the average distances from all points in the groups in the Illinois field, or with the average distances from points on individual lines only in those groups. It is comparisons such as these which the Milwaukee and the Indiana operators in effect insist in their briefs were not given the proper weight by the Commission. Several examples of comparisons of this nature will be found beginning on page 18 of the brief for the Indiana operators.

An example of such comparisons in the Milwaukee's brief appears on page 27, where it is stated:

> "To further emphasize the fact that the conclusion by the Commission that the rates would be unreasonably low in violation of Section 1 (5), was simply arbitrary, attention is called to the fact that while the Milwaukee proposes a rate of $1.70 from mines on its line in the Brazil-Clinton district to Rockford, it is required to join in rates from mines in the Springfield, Illinois, group to Rockford of $1.70 over routes which are much longer and which reach as a maximum 373 miles (R. 147). Certainly the conclusion that a rate of $1.70 for the transportation of coal 231 miles, single line, is unreasonably low as compared with the same rate for 373 miles, joint line, is simply arbitrary and such a comparison offers no support for the finding."

The Commission's reply to the contentions of the Milwaukee and the Indiana operators we have been discussing was twofold, as we brought out on page 74 of our original brief. The full Commission explained in its report (R. 39) that it was here dealing with a group rate adjustment and that the average distances from all points in the group should be used and that any other method of computing distances would tend to destroy all groupings and could not be adopted.

The Commission further pointed out that if distances from only those mines on certain roads in the various groups were to be compared there were comparisons which favored the rates from the mines in the Illinois groups as well as those which favored the Milwaukee's proposed rates from its mines in Indiana, using only the distances from the Milwaukee's mines. As an example, the Commission called attention to the average distance via the short tariff route from mines on the Illinois Central only in the Springfield group to Rockford of 199 miles, compared with the distance to Rockford from mines on the Milwaukee in the Brazil-Clinton group of 231 miles. This comparison answers specifically the statement in the Milwaukee's brief

quoted above. The Milwaukee stresses in its brief the difference that the distance from its mines is via its single line route, whereas the distance from the Illinois Central Springfield mines is via a joint line route. The routings in the exhibits show, however, that the carriers have made no distinction between single and joint line routes in the establishment of their rates. Furthermore, either route of the Milwaukee from the Indiana field to northern Illinois involves at least one division point (R. 91). The fact that joint routes necessitate interchanges with connecting lines is not of controlling significance, especially where the carriers themselves have made no distinction between single line and joint line routes.

It is obvious that if the principles of group rate making are discarded and distances from only selected points in the groups are taken, the distances from the nearest points in one group can be compared with the distances from the farthest points in another group and practically any desired showing obtained, as was frankly recognized by the witness for the Indiana operators (R. 103). Yet, on page 17 of their brief, the Indiana operators compare rates from Mt. Olive, Ill., in the Springfield group, using distances from Mt. Olive alone, with the proposed rates from the Milwaukee mines in the Brazil-Clinton group, using distances from the Milwaukee mines alone. The Milwaukee mines are the nearest to the Brazil-Clinton group, Exhibit 8 (R. 149). Mt. Olive is in the southern part of the Springfield group near East St. Louis (R. 85) and consequently one of the most distant points in that group. The witness for the Milwaukee who introduced the Mt. Olive distances in Exhibit 1, apparently offered them for information only and not as a fair comparison (R. 85).

The witness for the Milwaukee frankly conceded the obvious fact that the coal rates have not been made on a mileage basis and stated that the group basis should be

continued (R. 87). The testimony of the witness for the Indiana operators, set out on page 76 of our original brief, is to the same effect. The Indiana operators advocated the extension of the Milwaukee's reduced rates to all points in the Brazil-Clinton and Linton-Sullivan groups, and hence the preservation of those groups (R. 102). The witness for the Indiana operators would not say that rates in this adjustment should be fixed on distance alone (R. 138). Yet, in spite of this testimony both the Milwaukee and the Indiana operators urged methods of comparing rates and distances in their briefs which would be absolutely destructive of group rate adjustments, as the Commission pointed out in its report.

Several decisions of the Commission were cited in a footnote to page 74 of our original brief as indicating the importance of the group method of making rates on coal. In one of the cases there cited, *Intrastate Coal Rates to East St. Louis,* 161 I. C. C. 371, the Commission, on page 379 of the report, made the following quotation from an earlier case, *Appalachian Power Co.* v. *N. & W. Ry. Co.,* 144 I. C. C. 333, 342, which accurately summarizes the situation:

> "It is a generally accepted practice to maintain coal rates on group bases on the theory, often vigorously supported by both operators and consumers, that such an adjustment gives consumers an opportunity to purchase coal in competitive markets, and enables farther distant mines to compete at the various points of consumption with mines which are nearer to such points. The establishment of distance rates would tend to localize the source of supply of the consumers, destroy to a large extent the existing competition, and probably have an important influence on the cost of coal."

The tendency to make rates from the more distant groups relatively lower, distance considered, than from nearer groups was recognized by the Commission in the instant case, and was commented upon in the report of the full Commission (R. 40, 41), where it is pointed out that it is

true that the rates from the more distant southern Indiana groups are relatively lower, distance considered, than the rates from the Brazil-Clinton and Linton-Sullivan groups, but as the trend of the traffic is to the important markets to the north and northwest of the coal producing areas, the existing relation is apparently for the purpose of enabling producers in the more distant southern groups to compete in these markets with producers in the northern groups.

The same observation applies to the rates from the southern Illinois groups. Numerous exhibits expressed the rates involved in terms of percentages of one of the few mileage scales on coal, the Holmes & Hallowell scale, as a sort of common denominator for unequal rates applying for unequal distances. Percentages of this scale are set out by the Commission in its report (R. 11, 39). The factor we have been discussing, namely, that the rates from the more distant groups are relatively lower, distance considered, than the rates from the nearer groups, had to be borne in mind in considering percentages of the scale. This was recognized by the witness for the Indiana operators (R. 103, 104). All of these considerations with respect to distance which we have been discussing are matters with which the Commission is especially qualified to deal. It is not the province of the court to substitute its judgment for that of the Commission with regard to such matters.

We pointed out on page 76 of our original brief that this Court has recognized that distance is only one element to be considered in the fixing of rates. There are two important varieties of rates with respect to which distance is not controlling, switching rates and group or blanket rates. Examples of both varieties of such rates have recently been before this Court. *Illinois Commerce Commission* v. *United States,* 292 U. S. 474, decided May 28, 1934, involved intrastate switching rates within the Chicago Switching District which the Commission had required to be increased

to the level of the interstate switching rates within the district under the thirteenth section. One of the principal grounds upon which the thirteenth section order was attacked by the appellants was that a cost study relied upon by the Commission was not sufficiently representative. The chief criticism of the study was that there was a great disparity between the average length of hauls between intrastate and interstate movements and that the Commission, therefore, erred in prescribing a uniformity of rates throughout the entire district. On this point, this Court said, page 486:

> "So far as this objection is of any force it goes only to the weight of the evidence and not to the want of it. Treating an area as a unit and applying a uniform blanket or group rate within it, as is the common practice with respect to switching rates, is within the competence of the Commission. See *St. Louis Southwestern R. Co.* v. *United States,* 245 U. S. 136, 138, Note 1, 141; *United States* v. *I. C. R. R. Co.,* 263 U. S. 515, 518, Note 1; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 660, 664."

In *State of Ohio* v. *United States,* 292 U. S. 498, also decided on May 28, 1934, involving intrastate coal rates in Ohio under the thirteenth section, this Court had before it a differentially related origin group coal rate adjustment similar to the one involved in this proceeding. Among the contentions of the appellants was the claim that the Commission exceeded its authority in requiring state rates to be raised without having found or made reasonable all substantially competitive interstate rates. This claim was based largely on the circumstance that the relationship stressed by the Commission was the relationship to the interstate rates from the nearer groups and that the rates from the more distant so-called Crescent groups had not been considered. This Court set out on page 502 of the opinion, a rather elaborate description of the groups, the extent of the groups, and the differential relationships. Groups and

differentials were further referred to on pages 509 and 510 of the opinion. The Commission's order was sustained.

In *St. Louis Southwestern Railway Co. v. United States*, 245 U. S. 136, this court sustained an order of the Commission establishing through routes and joint rates on logs and lumber from the blanket territory in the southwest to Paducah, Kentucky. The blanket territory is thus described in the footnote on page 138 of the opinion:

> "This region is called 'blanket territory,' because a 'blanket' rate on logs and lumber is made from all shipping points within the territory to points beyond. That is, the rate is the same regardless of the distance hauled within the territory, which extends about 400 miles from north to south and 300 from east to west."

In *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, an order of the Commission prescribing a rate of 45 cents on lumber from the Pacific Coast to St. Paul, Minn., was sustained. The carriers contended that the Commission's order was without support in the evidence. One of the grounds relied upon was that the Commission had allowed a rate of 50 cents from the Pacific Coast to Omaha, a shorter distance than to St. Paul, to stand. The carriers argument is thus summarized on page 551 of the opinion:

> "It was argued that when the Commission had adjudged that a rate of 50 cents for 1800 miles was reasonable, it was manifestly unreasonable to allow a rate of 45 cents for 2052 miles, and that such order was so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the Commission's power."

This contention is discussed at length. The Court pointed out that the order must be read in the light of the entire record, including the important fact that the carriers themselves in making their rates made a similar distinction between the long and short line. In disposing of the carriers' contention the Court said, page 553 of the opinion:

> "It is quite true that the carriers may do what they

could not be compelled to do. But it is not to be assumed that they made and continued these different rates between these two cities arbitrarily and without reason. It was proper for the Commission to consider the weight and the character of these reasons and the causes which prompted and justified the carriers in charging these different rates. When the Commission maintained the same ratio of difference as that made by the carriers themselves, it cannot be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form, of its power."

It is submitted that these decisions to which we have referred show conclusively that the arguments of the Milwaukee and the Indiana operators advanced in their briefs go only to the weight of the evidence and not to the lack of evidence. The weight of such evidence is peculiarly within the province of the Commission, which is best qualified by many years of general experience and past litigation dealing with this specific rate structure to determine what weight should be given to the numerous and conflicting comparisons of rates and distances in this proceeding.

THE COMMISSION'S DECISION IN THE INSTANT CASE WAS NOT INCONSISTENT WITH ITS PRIOR DECISIONS IN THE WESTERN KENTUCKY CASES, NOR DO THE FINDINGS IN THOSE CASES PROHIBIT FURTHER REDUCTIONS IN THE WESTERN KENTUCKY RATES TO MEET REDUCTIONS IN THE RATES FROM SOUTHERN ILLINOIS WHICH WOULD BE PRECIPITATED BY THE MILWAUKEE'S REDUCTIONS FROM THE INDIANA FIELD.

The Milwaukee stresses in its history of the rates, beginning on page 6 of its brief, the circumstance that after the Commission concluded in the thirteenth section case, *Intrastate Rates On Bituminous Coal in Illinois,* 182 I. C. C. 537, that it could not interfere with the reduction of 17 cents per ton in the intrastate rates from Illinois groups

to Rockford and Freeport, a like reduction of 17 cents per ton in the rates from western Kentucky to Rockford and Freeport was made on the theory that the outstanding order of the Commission in the first western Kentucky case, *Illinois-Indiana Coal Cases*, 128 I. C. C. 265, had definitely fixed the differential relationship between western Kentucky and Illinois on coal moving to destinations in northern Illinois, and that this reduction was permitted by the Commission. The Milwaukee brings out on page 9 of its brief that in the *Illinois-Indiana Coal Cases, supra,* the Commission related the rates from western Kentucky to the rates from the Indiana groups, including the Brazil-Clinton and the Linton-Sullivan groups, as well as to the rates from southern Illinois, although the relationship was expressed in terms of a differential of 35 cents western Kentucky over southern Illinois. The finding of the Commission on page 284 of the report in *Illinois-Indiana Coal Cases* is quoted in full. The Milwaukee's brief assumes, without so stating, that the order of the Commission entered in connection with the report conformed to the finding quoted. It is conceded that this assumption is correct, as an examination of the Commission's order of June 14, 1927, entered in connection with the Commission's report in *Illinois-Indiana Coal Cases* discloses.

In the finding quoted by the Milwaukee, the Commission found that the undue prejudice to mines in Illinois and Indiana and undue preferenc to mines in Kentucky condemned by it was due to the maintenance of unreasonably low rates from mines in western Kentucky, and should be removed by increasing the rates from said mines in the amount of 10 cents per net ton to all destinations in the states named (which included Illinois), to which the existing differential of western Kentucky over the southern Illinois group was 25 cents per net ton. Based upon this finding the Milwaukee makes two somewhat inconsistent

contentions. It contends, first, (page 10 of its brief) that inasmuch as relationships between the rates from western Kentucky, on the one hand, and the rates from the Brazil-Clinton and Linton-Sullivan groups, on the other hand, were prescribed in the *Illinois-Indiana Coal Cases,* and western Kentucky rates have been reduced 17 cents per ton, the proposed reductions of the Milwaukee of 17 cents per ton in the rates from its mines in the Brazil-Clinton and Linton-Sullivan groups were necessary to restore the prescribed relationships and, therefore, should not be prevented by the Commission. The second contention (page 32 of the brief) is that the Commission's conclusion that further reductions in the rates from western Kentucky would be precipitated by the Milwaukee's reductions is in error because any such attempted reductions in the western Kentucky rates would be in direct violation of the Commission's outstanding order in *Illinois-Indiana Coal Cases,* 128 I. C. C. 265, 284. If this latter contention is correct, the reduction of 17 cents per ton in the western Kentucky rates made following the reductions in the rates from southern Illinois was likewise in violation of the Commission's order and should be restored to their former level. An examination of the western Kentucky cases is all that is necessary to dispel the confusion which the Milwaukee's partial statement of the history of the rates has created.

The Commission's conclusion in the instant case with respect to the western Kentucky rates was not based on *Illinois-Indiana Coal Cases* alone. The western Kentucky differential of 35 cents over southern Illinois was thus described in the report of the full Commission (R. 35):

> "A differential of 35 cents over the southern Illinois group was fixed from western Kentucky to northern Illinois points, among others, in *Illinois-Indiana Coal Cases,* 128 I. C. C. 265, and recently affirmed in *West Kentucky Coal Bureau* v. *Illinois Central Railroad Company,* 172 I. C. C. 279."

The Commission's report in the second western Kentucky case, *West Kentucky Coal Bureau* v. *Illinois Central Railroad Company, supra,* explains why reference to relationships to the Indiana groups was omitted by the Commission in dealing with the rates to the northern Illinois points here involved, and also explains the statement of the full Commission (R. 44), that further reductions in the Illinois intrastate rates would lead to like reductions in the rates from western Kentucky for the purpose of preserving the differential basis over the rates from the southern Illinois group prescribed by it. In *West Kentucky Coal Bureau* v. *Illinois Central Railroad Company, supra,* the Commission reconsidered the western Kentucky rates and relationships previously prescribed by it in *Illinois-Indiana Coal Cases, supra.* Rates to destinations in Michigan, Illinois, Wisconsin, Minnesota, Iowa, Nebraska, North Dakota and South Dakota were involved. In the meantime, the Illinois intrastate rates had been reduced by the Illinois Commission. The following statement was made by the Commission in the *West Kentucky Coal Bureau Case* on page 293 of the report with respect to rates to points in Illinois:

> "As stated above, after we had prescribed, in the *Illinois-Indiana Coal Cases, supra,* an increase of 10 cents in the rates from mines in western Kentucky to points to which the then existing differential of western Kentucky over the southern Illinois group was 25 cents, the Illinois Commerce Commission prescribed certain reduced rates within Illinois. These reductions resulted in rate differences between the two groups ranging from 40 cents at Chicago to 59 cents at certain other points in Illinois. Such changes have increased the maladjustments stressed in the dissenting expressions in *Illinois-Indiana Coal Cases, supra.* This record is persuasive that the differentials resulting from the *Illinois-Indiana Coal Cases, supra,* should be observed as maxima. The question as to the lawfulness of the intrastate rates on coal in Illinois is be-

fore us in Docket No. 23130, *Intrastate Rates on Bituminous Coal Between Points in Illinois.*"

The Commission's findings on page 294 of the Report, are as follows:

> "We find that the rates assailed are not unreasonable, but that they are, and for the future will be, unduly prejudicial to complainants and unduly preferential of their competitors in Illinois and Indiana to the extent that they exceed, or may exceed, by more than 35 cents per ton of 2,000 pounds, the rates contemporaneously maintained from mines in the southern Illinois group and Evansville group in Indiana to the same destinations.
>
> "An appropriate order will be entered *except as to the rates assailed to points in Illinois from mines in western Kentucky.* In view of the fact that the level of the intrastate rates on coal in Illinois is now before us in No. 23130, we will not at this time enter an order with respect to the rates to points in that State, but upon determination of the issues in No. 23130, defendants will be expected to give effect to our finding herein with respect to the assailed rates to points in Illinois." (Italics ours.)

It should be noted that in this reconsideration of the western Kentucky rates no order was made with respect to the rates to points in Illinois on account of the pendency of the thirteenth section case, and that in the findings with respect to the rates to other destinations the minimum rate finding in the *Illinois-Indiana Coal Cases,* previously referred to, was abandoned and a finding in the form of a differential relationship of 35 cents per ton over the southern Illinois group and the Evansville group in Indiana substituted in its place. The Evansville group, the most southerly group in Indiana, was the only Indiana group mentioned and it was included because, generally speaking, it took the same rates as southern Illinois.

In *Illinois-Indiana Coal Cases, supra,* the Commission dealt with the northern Illinois territory as a whole and its findings with respect to relationships to the Indiana

groups were predicated on the Chicago situation, as is clearly indicated on pages 270, 271 and 283, of the report. Rates from the Brazil-Clinton and Linton-Sullivan groups to Chicago were prescribed on page 284 of the report. In the thirteenth section case, *Intrastate Rates on Bituminous Coal Between Points in Illinois,* 182 I. C. C. 537, which has already been fully described, the Commission dealt with the specific destinations in northern Illinois to which the Illinois Commission had reduced the intrastate rates. These destinations were Chicago, Rockford, Freeport, and Dixon. The reduction of 5 cents per ton in the rate from southern Illinois to Chicago was found to be in violation of the thirteenth section and the undue preference and prejudice was removed by the restoration of the former rate of $1.95 per ton, but when the Commission came to consider the individual rates to Rockford and Freeport it found that although the intrastate rates were well below the general level of rates in this territory, the same was true of the rates from the Indiana groups and that it could not require any increase in the Illinois rates to these points until the Indiana rates were increased to the level generally obtaining in this territory. The carriers had been instructed by the Commission in the *West Kentucky Coal Bureau Case* to conform their rates to points in Illinois to the findings in that case. This obviously required a reduction in the western Kentuncky rates to Rockford and Freeport of 17 cents per ton to restore the differential prescribed in the *West Kentucky Coal Bureau Case.*

There is no basis for the Milwaukee's assumption that this reduction in the western Kentucky rate constituted a violation of an outstanding order of the Commission, either with respect to the measure of those rates, or to their relationship to the rates from the Indiana groups. The relationships between the Illinois and the Indiana groups at Rockford and Freeport were found not to be unlawful in

the thirteenth section case. The only conclusion to be drawn from the Commission's report in the thirteenth section case is that the same situation would obtain with respect to rates from western Kentucky on the prescribed differential of 35 cents over southern Illinois.

The orders of the Commission in the *West Kentucky Coal Bureau Case* are not before the Court, but assuredly it is not to be presumed that rates which had been in effect an appreciable length of time are in violation of Commission orders.

The Milwaukee's entire argument that the Commission's decision and order in the instant case were inconsistent with the western Kentucky cases can be summarily disposed of by reference to the decisions of this Court holding that inconsistency in Commission decisions is not a matter of legal significance in determining the validity of its orders. In *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 775, this Court said

> "It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decision, or the consistency of its conclusion with those reached in similar cases."

In *Virginian Railway Company* v. *United States*, 272 U. S. 658, 665-666, this Court held:

> "This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

Western Paper Makers Chemical Company v. *United States*, 271 U. S. 268, 271, is to the same effect. While these decisions would constitute a complete answer to the Milwaukee's contention, if it were sound, it was thought best to lay the matter before the court fully and to show that the action of the Commission in this case was not inconsistent with its prior decisions regarding the western Kentucky rates.

CONCLUSION.

The order of the Commission under review in this case requiring the cancellation of the reduced rates proposed by the Milwaukee constituted a valid exercise of the Commission's power under the Act to prevent the disruption of a most important rate structure and the unnecessary dissipation of the carrier's revenues under circumstances and conditions which make the conservation of revenues of paramount importance. It was supported by ample findings of facts made in the Commission's reports, which were in turn fully supported by the evidence. We endeavored to bring out in our original brief, beginning on page 62, that it is clear from the opinion of the District Court that it undertook to weigh the evidence and substitute its judgment for that of the Commission. To sustain the District Court would be to permit important rate relationships, and ultimately the level of the rates, to be determined by the carriers under the protection of the courts rather than by the Commission, the body upon which Congress has imposed the duty of conserving the carriers' revenues so as to afford the people an adequate national transportation system. The decree of the District Court should be reversed and the bill of complaint dismissed.

Respectfully submitted,

H. H. LARIMORE,
WALTER MCFARLAND,
FRANK H. TOWNER,
ELMER A. SMITH,
JOHN T. QUISENBERRY,
Attorneys for Railroad Appellants.

Chicago, Illinois.
Feb. 1, 1935.